UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 7

UNITED STATES POSTAL SERVICE,	)	
	)	
Respondent	)	
	)	
and	)	**Case 14-CA-195011**
	)	
	)	
ROY YOUNG, an Individual	)	
	)	
Charging Party	)	

RESPONDENT'S POST-HEARING BRIEF

Respondent, United States Postal Service ("Postal Service"), pursuant to Section 102.42 of the Board's Rules and Regulations, as amended, hereby submits its post-hearing brief. According to the ALJ's Order issued at the conclusion of the hearing, post-hearing briefs are due on or before October 31, 2017. For the reasons set forth in more detail, below, Respondent requests that the allegations set forth in the instant complaint ("Complaint"), filed June 30, 2017, and amended during the hearing, be dismissed.

Specifically, General Counsel alleges that management violated Section 8(a)(1) of the Act when it issued multiple email instructions, prohibiting employees from emailing, or copying, all employees within the work unit regarding non-work related items during working hours. General Counsel further alleges that management violated Section 8(a)(3) of the Act when it issued Mr. Young a 14-Day Suspension for having violated its instructions regarding emails, above. The evidence and testimony presented at the hearing on September 25-26, 2017, however, demonstrate no violation of either Section 8(a)(1) or Section 8(a)(3) of the Act. Central to these allegations is the applicability and interpretation of Purple Communications, Inc., 361 NLRB No. 126 (2014), which held that employee use of email for statutorily protected communications on nonworking time is presumptively permitted by employers who have chosen to give employees access to their email systems.

First, Purple Communications is unworkable, both generally and relative to the specific facts of this case, and should not be applied. The Board should instead apply the rule articulated in Register Guard, under which an employer may allow nonbusiness communications through its e-mail system, or not, so long as it treats communications about protected topics at least as well as it does other non-work-related messages. Second, to the extent Purple Communications is applied, an employee's right to use the employer's email system is expressly limited to "nonworking time." In this case, Mr. Young used the Postal Service's email system, by copying all employees in his work unit, both while he was on work time and while some of the recipients of the emails were also on work time. Third, relative to the February 8 and 10, 2017, emails, at issue in paragraphs 5(A)(iii) and 5(B) of the Complaint, the evidence at hearing demonstrated that Mr. Young was not engaged in concerted protected activity because the emails were not sent in preparation for group action but, rather, were sent solely by and on behalf of Mr. Young himself.[1] In other words, those emails were an individual gripe. Fourth, General Counsel's allegation that Mr. Young was unlawfully issued a 14-Day Suspension should be deferred to the parties' grievance-arbitration process. The 14-Day Suspension, which has already been unilaterally reduced by management to a 7-Day Suspension, is the subject of a pending grievance and has been appealed by the union to arbitration.

I. FACTS

Roy Young is a National Support Technician (NST) with the Postal Service's Maintenance Technical Support Center (MTSC). Tr., p. 22. Erich Henegar became the Maintenance Management Specialist in the MTSC on December 24, 2017, and manages the

[1] Respondent concedes that Mr. Young and/or other employees were engaged in concerted protected activity relative to the January 9 and 10, 2017, emails at issue in paragraphs 5(A)(i and ii) of the Complaint and the March 13, 2017, email chain at issue in paragraph 5(C) of the Complaint. Respondent further concedes that Mr. Young was engaged in concerted protected activity relative to the March 14, 2017, email which General Counsel moved to amend into the Complaint during the hearing. Tr., pp. 399-400.

NSTs. Tr., p. 191. Brian Watts is a Maintenance Field Support Specialist and manages Mr. Henegar. Tr., pp. 322, 324. Dan Fauchier is a Maintenance Engineering Analyst. Tr., p. 288.

The MTSC provides technical assistance to all Postal Service facilities with mail processing equipment. Tr., p. 188. The technical assistance is provided both via telephone and on site. Tr., pp. 29, 321. The MTSC employs approximately 100 NSTs, domiciled in 76 to 78 facilities in six different time zones. Tr., pp. 194, 324. The MTSC operates 24 hours per day, 365 days per year. Tr., pp. 149, 325, 295. There are some NSTs on duty at all times. Tr., pp. 149, 295. Prior to July 2016, NSTs reported to their domicile facility for administrative and collective bargaining issues. Tr., p. 189. Effective July 2016, NSTs reported to the MTSC, which is centrally managed out of Norman, Oklahoma. Tr., p. 189.

NSTs typically communicate about work-related matters with their managers and co-workers via email. Tr., pp. 28, 149-150, 197-198, 327. Sometime in January 2017, one of the NSTs established a Facebook page which is accessible to all the NSTs, but not management, to discuss issues involving the contract and work assignments. Tr., pp. 180, 184-185; GC Exhibit 27. NSTs do not take scheduled lunches or breaks, but rather they use their discretion when to eat lunch or take breaks. Tr., pp. 149, 195-196, 295.

> Their work is very technical, it's, they may engage in a problem that requires them to stay on a problem that may be symptom specific, and they may stay engaged at their discretion for two to three hours and then take a break, they may have a light period and take a break within an hour. We do not schedule that.

Tr., p. 195.

Neither management nor the other NSTs know when an NST is working or is at lunch or on break. Tr., pp. 150, 196, 198.

Postal Service Rules/MTSC Instructions Regarding Email Usage

On October 1, 2009, the Postal Service issued Management Instruction EL-660-2009-10, permitting employees to make limited personal use of Postal Service equipment, including information technology, "provided such use does not: [r]educe or otherwise affect the employee's productivity during work hours." GC Exhibit 4 (p. 1)(emphasis added).

By email, dated January 25, 2017, Mr. Henegar issued the following instruction to the NSTs:

> Emailing all employees in the network with non-work related items, during work hours, is an inefficient use of resources. This platform was created to provide you and your peers the opportunity to share each other's knowledge and skills to better perform your job. Please ensure that, while you are on working time, your efforts stay affixed to that goal. This is an expectation, and failure to adhere to this expectation can lead to corrective action.

Tr., pp. 211-213; GC Exhibit 5, R Exhibit 4 (emphasis added).

At hearing, Mr. Henegar distinguished emails sent by employees while they are working and while they are not working as follows:

> Well, if they're working, they are to be productively engaged. They're to do the work that they're being assigned, they're being compensated to do a job. They, that job that they were hired that they should be actively engaged in, that work that we assign them is what should be taking up their time.

Tr., p. 212.

February 8, 2017, Emails

On February 8, 2017, Mr. Henegar received an electronic log in which Mr. Young "recommended that a NST come on site to evaluate [an] issue" at the South Jersey PDC. Tr., pp. 199-200; GC Ex. 21 (p. 3); R Exhibit 2 (p. 2). Mr. Henegar had the following concerns about Mr. Young recommending an NST to come on site:

,,, the decision to send an NST onsite, whether it's their domicile site or otherwise, is a management decision. It's not something I want an NST recommending like that. Certainly if it was a problem, we could deal with it behind the scenes within MTSC, but as we face the field, our procedure is that's a management decision.

...

In this case where we may have, we had an on – a domicile employee, an employee who's in that facility, even in that circumstance where we send that employee away from the HelpDesk duties and out onto the floor they're no longer supporting the network, so all those skills that they have and the things they do to support the network, they're now stopped until the issue is resolved, so we lose their expertise, but more importantly, if we don't have a person whose on the domiciled facility, the decision to send somebody onsite then includes travel and cost, that is something we evaluate dependent upon the criticality of the issue and whether we've worked through all of our escalation protocols.

Tr., pp. 201-202.

Later that day, Mr. Henegar sent an email to Mr. Young, copying no one, asking him to:

Please explain your diagnostic approach with the log below. I would like to understand why the site would need to request onsite within 25 minutes of you taking the ticket. Did you mean for the site to clear your release with the HelpDesk? Were you requesting another NST to come in and diagnose this issue?

Tr., pp. 202-203; GC Exhibit 21 (p. 2), R Exhibit 2 (p. 1).

Mr. Young responded to Mr. Henegar via email, copying all the NSTs on the MTSC network. Tr., pp. 203-204; GC Exhibit 21 (p. 2), R Exhibit 2 (p. 1). Mr. Henegar responded to Mr. Young via email, providing the following statement and instruction:

Again, my individual questions to you do not need to be broadcast to the rest of the network. This was a technical question to understand the diagnostic logic. It was not directed at the other men and women in the network and it is not a prudent use of their time to be included on a question to you. Please refrain from this activity during your working hours that is not directly related to supporting a log.

Tr., p. 204; GC Exhibit 21 (p. 1-2), R Exhibit 2 (p. 1)(emphasis added).

As further explained by Mr. Henegar at hearing:

> Well, first, it's not an efficient use of everyone's time, not everyone's working on that log, it's not pertinent to everybody else, I'm not asking about everybody's diagnostic approach, I'm not asking about ... the ticket everybody else is working, only one that Roy was working. Only the performance concern I had about the ticket Roy was working. It wasn't a change in procedure, it wasn't anything related to that, just what's going on with this one ticket that you worked that would cause us to change what we do. And it wasn't an efficient use of everyone's time.

Tr., p. 204.

Mr. Young responded to Mr. Henegar via email, again copying all the NSTs on the MTSC network, in direct contravention of Mr. Henegar's instruction. Tr., p. 206; R Exhibit 2 (p. 1).[2]

February 10, 2017, Emails

On February 10, 2017, Mr. Watts received an electronic log in which Mr. Young indicated he would escalate a project to a subject matter expert ("SME"). Tr., pp. 328-329;GC Ex. 11 (pp. 2-3). Mr. Watts had the following concerns about Mr. Young escalating the matter to a SME:

> That entry at 10:17:37 ... the site is in the process of replacing a cable, so we know or we think that this cable assembly is bad. So, so they're going to go get that cable and go out to the machine and replace it. We should absolutely be following up with them at Mr. Young's level the results of that cable replacement. There's, there's no good reason I could come up with in my mind from my knowledge and experience on why you would escalate that to a Subject Matter Expert. That, that doesn't, that didn't make any sense to me. We should have waited until the cable replacement took place, we should have called back to the site or waited for them to communicate with us, and if they didn't do that in a timely manner, we should have communicated with them, and we should have seen the results, and then if the machine is not operational, we should have applied out knowledge – Roy should have applied his knowledge, skills and training to further troubleshoot and fix the problem, not simply just flipping it on to someone else.

Tr., p. 320.

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[2] Mr. Young sent this last response twice – one email only to Mr. Henegar and another email copying the NSTs. See respectively, GC Exhibit 21 (p. 1), R Exhibit 2 (p. 1).

Later that day, Mr. Watts sent an email to Mr. Young, copying Mr. Henegar, asking him to "please clarify your thought process for escalating this to SME, very important that the NST's exhaust every avenue for resolution at their level." Tr., p. 332; GC Exhibit 11 (p. 2). Mr. Young responded to Mr. Watts via email, copying all the NSTs on the MTSC network. Tr., p. 333; GC Exhibit 21 (p. 2). Mr. Watts responded to Mr. Young via email, providing the following statement and instruction:

> Roy just trying to understand why after working the site for 35 minutes you chose to escalate the problem to a SME with no way of knowing if the cable replacement fixed the problem.
>
> So you know Erich and I communicate with other NST's on a variety of issues to accomplish MTSC's goal of supporting the field in an efficient manner. No need to write me back on this topic and as you have been previously instructed on several occasions, when corresponding with management it's not necessary to copy the entire network. Thanks and please focus your efforts on resolving tickets in an efficient manner to support the network.

Tr., pp. 333-334; GC Exhibit 11 (p. 1)(emphasis added).

As further explained by Mr. Watts at hearing:

> I, my concern was for the National Support Technician distribution. We have these people, they're working, they're trying to solve tickets, they're trying to fix problems, and this divisive, probably not the right word, but this type of conversation here is not productive for the rest of the group, the technicians, to post employees on here, nothing to do with anybody else ...

Tr., p. 336.

Mr. Young responded to Mr. Watts via email, again copying all the NSTs on the MTSC network, in direct contravention of Mr. Watts' instruction. Tr., pp. 334-335; R Exhibit 2.

Mr. Young Was On Working Time
When Sending These Emails

Relative to both the February 8 and 10, 2017, email exchanges, MTSC management had the right to ask Mr. Young about the work he was performing and it was part of Mr. Young's job to answer management's questions. Tr., pp. 151, 205, 337. As such, Mr. Young was

working, or on work time, when answering Mr. Henegar's and Mr. Watts' questions. Tr., pp. 152, 206, 337.

Involvement Of Other NSTs
On The February 8 and 10, 2017, Emails

Although copied by Mr. Young on the February 8, 2017, or February 10, 2017, email chains, no other NST responded to those emails. Tr., pp. 154-155; GC Exhibits 11 and 21. Mr. Young also stated under oath in his March 28, 2017, affidavit to the NLRB, that "I did not discuss these issues with any of my fellow employees." Tr., p. 156. To the contrary, Mr. Young testified at hearing that "I have discussed it on length with various employees over the telephone and in person. Other NSTs, yes." Tr., p. 157. No other NSTs testified at the hearing. The only evidence produced by General Counsel to support Mr. Young's testimony that he discussed either of these email chains with other NSTs is a March 9, 2017, email from NST, purportedly written by Joseph Jeske. Tr., pp. 61-63; GC Exhibit 6. In that email, Mr. Jeske writes:

> And even if you don't remember it, I supported your decision on an APPS ticket that Mr. Henegar was harassing you about because I felt he was wrong, and in that case, we agreed on the diagnosis or plan of action. I saw that for what it was; an attempt to discredit you.

GC Exhibit 6 (p. 1).[3]

Mr. Young also stated in his NLRB affidavit, under oath, that "none of these employees responded to my emails." Tr., pp. 160-161. Mr. Young testified at hearing, however, that Mr. Jeske's March 9, 2017, email was not a "response" to the February 8 or 10, 2017, emails. Tr., pp. 160-161.

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[3] Mr. Jeske's email is part of an unrelated email chain. GC Exhibit 6. The Postal Service objected at hearing to the inclusion of Mr. Jeske's email based on hearsay.

Notice Of 14-Day Suspension

Mr. Henegar issued Mr. Young a Notice of 14-Day Suspension, dated March 14, 2017, for failure to follow instructions. Tr., pp. 213-214; GC Exhibit 14. The 14-Day Suspension was based solely on Mr. Young's failure to follow the instructions issued by Mr. Henegar on February 8, 2017, and Mr. Watts on February 10, 2017, not to copy the MTSC network on his emails. Tr., p. 215; GC Exhibit 14. As set forth in 14-Day Suspension, "[t]his behavior is disruptive to the network, and causes other technicians to deviate from their work while reviewing email traffic that is not germane to their task, productive or in regard to the overall knowledge base." GC Exhibit 14 (p. 1). That Mr. Young also copied several union officials was not a factor when issuing the 14-Day Suspension. Tr., p. 216.

The union has filed a grievance regarding the 14-Day Suspension on Mr. Young's behalf, which has been appealed to arbitration and is not yet resolved. Tr., pp. 216-217: GC Exhibit 8. The grievance-arbitration process between the Postal Service and the APWU contains the final step of binding arbitration. GC Exhibit 2 (p. 89). The parties' collective bargaining agreement broadly states that employees may not be disciplined or discharged except for just cause and that "[a]ny such discipline or discharge shall be subject to the grievance-arbitration procedure provided for in this Agreement, which could result in reinstatement and restitution, including back pay." GC. Ex. 1 (p. 94). Separately, and without resolving the grievance, Mr. Watts unilaterally reduced the 14-Day Suspension to a 7-Day Suspension on May 17, 2017. Tr., pp. 339-340; R Exhibit 9.

Other Allegedly Unlawful MTSC Instructions Regarding Email Usage

In addition to the MTSC instructions within the February 8 and 10, 2017, email chains, General Counsel alleges three other unlawful MTSC instructions.

First, paragraph 5(A)(i and ii) of the Complaint references two emails from Mr. Henegar to Mr. Young, relating to Mr. Young's request for annual leave on December 30, 2016. GC

Exhibit 10. Mr. Young made the request on December 29, 2016, via an email to Mr. Fauchier. GC Exhibit 10 (p. 5). The same day, Mr. Fauchier approved the leave pending documentation. GC Exhibit 10 (p. 5). Still the same day, Mr. Young responded to Mr. Fauchier, copying the MTSC Network, stating: "For your reference this annual is scheduled in advance and approve therefore is not emergency request. Your request for documentation is inconsistent with Postal Policy." GC Exhibit 10 (p. 4). By email, dated January 9, 2017, Mr. Henegar responded to Mr. Young, stating that "[a]ny responses to this email should be restricted to Dan and me." GC Exhibit 10 (p. 3). Mr. Young responded on January 10, 2017, again copying the MTSC network. GC Exhibit 10 (pp. 2-3). Mr. Henegar responded the same day, stating as follows:

> I have asked you to restrict your email to Dan and me. Specifically, you are afforded grievance rights under Article 15 of the National Agreement should you disagree with the directive. You are not empowered with the right to the equivalent of screaming on the work room floor. Please ensure that you are using the appropriate channels.

GC Exhibit 10 (pp. 1-2).

Second, paragraph 5(C) of the Complaint references a March 13, 2017, email from Mr. Fauchier, at the end of an email chain discussing the possible need for passports when traveling via airplane and who would pay for the passports. Tr.. p. 290; GC Exhibit 12. The issue over who would pay for passports was first raised by NST, Gary Freeman, on March 7, 2017, copying all the NSTs on the MTSC network. GC Exhibit 12 (p. 7). NSTs, Muncy Henderson, James Lynch, Arnold Boyd and Jerrold Zieba joined Mr. Freeman in the discussion, again copying everyone. GC Exhibit 12 (pp. 3-7). Mr. Fauchier responded to all on March 9, 2017, stating that "[t]he expense of the REAL ID is on the individual traveler and will not be paid by the Postal Service." Tr., p. 292; GC Exhibit 12 (p. 2). NSTs, Geoff Stevens, James Lynch and Thomas Wood continued the discussion through March 11, 2017, again copying everyone. Tr., p. 293; GC Exhibit (pp. 1-2). Mr. Fauchier then responded to all on March 13, 2017, stating that "[t]he ruling from HQ back from the days of Chadwick: The cost of required ID for travel is

on the traveler due to the fact that the same ID can be used for personal use as well. END OF SUBJECT please!" GC Tr., pp. 293-294; Exhibit 12 (p. 1).

Mr. Fauchier further explained why he instructed the NSTs to end the conversation as follows:

> To discontinue what I felt was rhetoric and possibly taking away from their everyday duties in their job position. You know, this subject's been answered, let's get off the email chain and get back to our job.
>
> ...
>
> While it was very valid comments and questions, I answered that twice and felt it was time we need to discontinue it.

Tr., pp. 294-295.

Third, during the hearing, General Counsel moved to amend the Complaint to include an allegation that Mr. Henegar issued another unlawful instruction regarding email usage on March 14, 2017. Specifically, after being asked to provide support by the MTSC HelpDesk, Mr. Young emailed the HelpDesk and the entire MTSC network, which includes Mr. Henegar, "I do not monitor email for logs please call me in the future if you need me to pick up a log." GC Exhibit 13 (p. 2). Mr. Henegar responded only to Mr. Young, stating that Mr. Young is required to monitor his email, phone and VOIP for incoming logs and issuing the following instruction:

> I am responding to you by email and you may respond to me directly or call me, if you prefer. This is the reiteration of my work instructions performance expectations and is not appropriate for dissemination to the network or anyone else beside you and me.

GC Exhibit 13 (p. 1).

Other Emails With Which All NSTs Were Copied

General Counsel introduced into evidence eight exhibits, which include additional emails or email chains that were sent to the MTSC network.

First, NST Louis Mazurek sent an email on September 25, 2016, attaching a link to an article from The Onion. NST Bill Larsen responded to the MTSC network the next day. GC Exhibit 17.

Second, Mr. Fauchier sent an email on January 25, 2017, notifying the NSTs of upcoming TMS training in March and stating "[p]riority will be given to those with the referenced equipment (TMS – Lockheed Martin, Accusort, or Siemens) within 50 miles of their domiciled site." GC Exhibit 7 (p. 5). Mr. Young forwarded the email chain to several APWU representatives and, eventually, to NST Mike Tretick, stating that he thought training opportunities should be strictly based on seniority. GC Exhibit 7 (pp. 3-4). The email chain was then forwarded to the entire MTSC network and multiple NSTs debated whether training should be prioritized to those who have access to the equipment or should be based on seniority. The last email, dated March 10, 2017, was from NST Cliff Sucher.

Third, NST Mike Tretick initiated an email chain on March 15, 2017, about the Postal Service offering early retirement to 150,000 workers.

Fourth, combined into one exhibit are seven emails from different NSTs, sent between August 21 and 23, 2017, relating to the total eclipse of the sun. GC Exhibit 29.

Fifth, combined in one exhibit are approximately 20 separate emails or email chains, dated between August 25, 2017, and September 1, 2015 – all relating to Hurricane Harvey in Houston, Texas. GC Exhibit 18. Some detail the anticipated wind speed, inches of rain expected and/or time of landfall, and include jokes about needing a bigger boat. GC Exhibit 18 (pp. 1-10, 23-25). Some attach photos of the Houston flooding, and include jokes about buying a boat as an investment. GC Exhibit 18 (pp. 11-16, 26). One advises that North Houston has been shut down. GC Exhibit 18 (p. 17). Some attach photos of the flooding, and include jokes about "good ol' boys" fishing. GC Exhibit 18 (pp. 18-20). Two are captioned "hobby airport" and appear to include a link to a facebook site or attach a photo, which were not introduced into evidence. GC Exhibit 18 (pp. 21-22). Finally, one begins with an email captioned "ESM

SolarWinds Alert Triggered," which is then forwarded to the MTSC network with pictures of pirate ships. GC Exhibit 18 (pp. 27-30). At hearing, Mr. Watts testified about these emails as follows:

> ... there's actually three NSTs domiciled at the Houston plant, and we were very concerned about their well-being. Harvey came in, I can't remember the exact date, but I remember we started messaging those technicians on Thursday prior, I believe it hit on Sunday or Monday, but we wanted to stay in constant communication with these folks daily to make sure they are all right ... I was just happy to get the response just the same, no matter who was copied, because I wanted to make sure these folks were okay, the three technicians.

Tr., pp. 342-343.

Sixth, NST Mike Tretick sent an email on September 11, 2017, reporting five or six trees down in his yard during Hurricane Irma, and joking about it being NST Randy Massey's fault for having recently moved to Florida. GC Exhibit 19. At hearing, Mr. Watts testified about these emails as follows:

> ... again, I was concerned at that time for Irma, the track of the storm was going to go up right through the center of the state. We have, I'm trying to count in my head real quick, I think it's six technicians domiciled, plus Erich Henegar lives in Florida, the state of Florida, and again, these folks being in Jacksonville, we had three people there, I was concerned for them just like I was for the folks in Houston, so any word from them was good news.

Tr., p. 344.

Seventh, combined in one exhibit are four emails or email chains, all involving NST Thomas Stein, who is domiciled in West Palm Beach, Florida, and sent on September 11, 2017, referencing "power tools and beer" or a "whiskey-fueled car." GC Exhibit 20. At hearing, Mr. Watts testified about these emails as follows:

> ... this is from NST Tom Stein, who's domiciled at the West Palm Beach plant, he had, did have a tree fall that didn't fall on his house, and he was making note that the tree fell, and he had his chain saw out and was going to work with the chain saw.

Tr., p. 345.

Eighth, combined in one exhibit are approximately 13 emails or email chains, all sent between September 15 and 17, 2017, relating to a cookout hosted for those NSTs who went to Florida to assist with the Postal Service recovery effort after Hurricane Irma. GC Exhibit 22. At hearing, Mr. Watts testified about these emails as follows:

> ... the email was from NST Tom Stein in West Palm Beach, and he was an integral part of our recovery plan in the southern part of Florida, along with other NSTs that traveled there to make sure we could get the plants back up and operational, and Tom Stein apparently had a cookout for some of those people that were sent there to recover, and he's talking about that recovery and showing pictures of the steaks they were going to cook and what not.

Tr., p. 346.

II. ARGUMENT

1. Purple Communications Is Unworkable And Should Be Overruled Or, Alternatively, Not Applied Under These Specific Facts

Initially, the Board erred when it issued Purple Communications and should now overrule that decision. Specifically, the Board misread the Supreme Court's decision in Republic Aviation v. NLRB, 324 U.S. 793 (1945), in which an employer banned in-person solicitation on its premises. Id. at 795. The case therefore presented a conflict between the employer's property rights and the employees' statutory rights and the Court recognized that these rights are often in tension, and that neither right is absolute. Id. at 797-98. The Court held that the Board's role is to strike a balance between the two, showing due respect for one without unduly burdening the other. Id. See also NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956) ("Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other."). Under the facts of Republic Aviation, the Court found that the employer's rule effectively obliterated the employees' statutory rights and, therefore, that the employer's rule must give way. Id. at 801, n. 6, and 805.

In the following decades, however, the Board and the courts recognized limits to the holding in Republic Aviation. For example, the decision did not give employees an absolute right for in-person solicitation -- employers could restrict solicitation in areas where it had a legitimate business interest to do so. Beth Isreal Hosp. v. NLRB, 437 U.S. 483, 506 (1978) (noting that a hospital could forbid solicitation in certain areas, such as operating rooms, patients' rooms, and patient lounges). What employers could not do is restrict solicitation to such a degree that employees had no remaining avenue to discuss protected activity. Register Guard, 351 N.L.R.B. at 1115 ("Republic Aviation requires the employer to yield its property interests to the extent necessary to ensure that employees will not be 'entirely deprived' of their ability to engage in Section 7 communications in the workplace on their own time"); Stoddard Quick Mfg. Co., 138 N.L.R.B. 615, 621 (1962) ("Thus, in conformity with the Supreme Court's mandate in Babcock & Wilcox, the limitation on the employer's property right in each situation is imposed only to the extent that it is necessary for the maintenance of the employees' organizational right.").

The Board also recognized a difference between in-person solicitation and written solicitation. The Board held, for example, that an employer may properly forbid pamphleteering on its workroom floors. Stoddard, supra,138 NLRB at 621. It reasoned that pamphleteering poses a heavier burden on the employer's property rights, as stray pamphlets may create litter and pose a safety hazard and a rule against pamphleteering poses a lighter burden on the employees' statutory rights, as written literature can be distributed and consumed outside the workplace much more easily than oral communication. Id. at 619-20.

Finally, the Board recognized that Republic Aviation gave employees no right to co-opt an employer's property or equipment. Register Guard, 351 N.L.R.B. at 1114 (noting that "the Board has consistently held that there is 'no statutory right . . . to use an employer's equipment or media,' as long as the restrictions are nondiscriminatory" (quoting Mid-Mountain Foods, 332

N.L.R.N. 229, 230 (2000)). In a series of cases, the Board found that employers could not be coerced into surrendering their bulletin boards, public-address systems, copy machines, telephones, and—finally—their e-mail systems. See, respectively, Eaton Techs., 322 N.L.R.B. 848, 853 (1997); Heath Co., 196 N.L.R.B. 134 (1972); Champion Int'l Corp., 303 N.L.R.B. 102, 109 (1991); Churchill's Supermarkets, 285 N.L.R.B. 138, 155 (1987); and Register Guard, 351 N.L.R.B. at 1114. The Board explained that what Republic Aviation requires is balancing, not a complete sacrifice of property rights:

> What the employees seek here is use of the Respondent's communications equipment to engage in additional forms of communication beyond those that Republic Aviation found must be permitted. Yet, "Section 7 of the Act protects organizational rights . . . rather than particular means by which employees may seek to communicate."

Id. at 1115 (quoting Guardian Indus. Corp. v. NLRB, 29 F.3d 317, 318 (7th Cir. 1995)).

Nevertheless, despite the plain language of the Supreme Court's opinion and nearly 80 years of unbroken precedent, the Purple Communications majority discarded these limits. It instead held that Republic Aviation gave employees the right to convert an employer's e-mail system to their own purposes – regardless of whether the employer's rules were discriminatory or whether the employees had other ways to communicate. 361 N.L.R.B. No. 126, slip op. at 1. In so doing, the majority badly misread Republic Aviation. The Court's decision explicitly requires the Board to balance statutory rights against property rights. 324 U.S. at 79. But the majority engaged in no such balancing and, instead, elevated statutory rights over property rights without considering the true burdens to either.

For example, the majority failed to consider the financial burdens additional e-mail traffic will place on an employer. Additional e-mail traffic is not, as the majority assumed, free. Even if one discounts the employer's initial capital investment in an e-mail system, increased volume imposes additional marginal costs. "Actiance, Osterman Study Reveals True Cost of On-Premises Enterprise Vault Archive Solution," Markets Insider (Sept. 28, 2017),

http://markets.businessinsider.com/news/stocks/Actiance-Osterman-Study-Reveals-True-Costs-of-On-Premise-Enterprise-Vault-Archive-Solution-723000 (noting that companies spend roughly $8,950 per terrabite of archived e-mails each year, with 35 gigabites added for each e-mail user). To begin, employers must pay for additional server space, must pay archival costs, and must pay for data retention. While one or two additional e-mails may add little to those costs, e-mail by its nature continues to accumulate, year after year. In the aggregate, additional costs are inevitable. Id. (noting the "common practice" among employers is to keep "everything forever—including data from departed employees").

Direct monetary costs aside, increased e-mail traffic also poses a cost in employees' attention and time. Much like the pamphlets in Stoddard Quick, unwanted e-mail can clutter an employee's inbox and distract from business-related tasks. See, e.g., CAN-SPAM Act of 2003, 15 U.S.C. § 7701(a)(4)(recognizing that "the receipt of a large number of unwanted messages ... decreases the convenience of electronic mail and creates a risk that wanted electronic messages, both commercial and noncommercial, will be lost, overlooked, or discarded amidst the larger volume of unwanted messages, thus reducing the reliability and usefulness of electronic mail to the recipient"). In other words, e-mail solicitation creates digital litter. *Cf.* Stoddard Quick, 138 N.L.R.B. at 621 (observing that the distribution of literature placed a greater burden on the employer's property rights because of its potential to cause litter and undermine productivity).[4]

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[4] E-mail traffic about Section 7 activity also poses administrative burdens. The majority's rule requires employers to open their e-mail systems for discussion of protected topics. Purple Communications, supra, 361 N.L.R.B. No. 126 at 1. Yet that requirement fits uneasily with other Board doctrines, such as the rule against unlawful surveillance. Id. at 20 (Miscimarra, dissenting) (citing Essex Int'l, Inc., 211 N.L.R.B. 749, 750 (1974)). As the Purple Communications majority itself recognized, employers have a legitimate business need to monitor their employees' e-mails. Id. at 20. Employers must ensure that workers comply with business-related policies, protect sensitive information, and don't use employer resources for illegal or tortious activities. Id. See also Register Guard, 351 N.L.R.B. at 1114 ("The General Counsel concedes that the Respondent has a legitimate interest in maintaining the efficient operation of its e-mail system, and that employers who have invested in an e-mail system have valid concerns about such issues as preserving server space, protecting against computer viruses and disseminating confidential information, and avoiding company liability for employees' inappropriate e-mails."). But under the majority's rule, ordinary business e-mails will inevitably mix with messages about protected activity. An employer, therefore, monitors business e-mail at its own peril. Purple Communications, 361 N.L.R.B. No. 126, slip op. at 20.

In this case, the 100 NSTs are domiciled in 76 to 78 separate facilities, providing technical assistance to postal management 24 hours a day, 365 day a year. There are some NSTs on duty at all times. They do not take lunches or breaks at scheduled times, but do so at their discretion, depending on their particular job duties that day. As such, neither management nor the other NSTs know when an NST is working or is at lunch or on break. Moreover, the NSTs primary means of communication about work-related matters is via the employer's email system. Therefore, allowing NSTs to copy the entire MTSC network with any emails that are not work-related inherently clutters their email boxes and distracts them from their assigned job duties.

The Board, however, downplayed this risk by adopting a "special circumstances" exception. That is, an employer can forbid nonbusiness e-mails if it proves that special circumstances make such a rule "necessary to maintain production or discipline." Id. at 1. The majority did not, however, explain what such a "special circumstance" might be, or how the employer might prove that it exists. Id. at 28 (Miscimarra, dissenting) (predicting that the majority's standard would sew confusion among employers and employees alike). The majority therefore left employers in the dark about when they can limit their e-mail systems to business use only – or indeed, whether they can ever do so. Id. In fact, in the nearly three years since the Board decided Purple Communications, it has yet to find any qualifying "special circumstances." See, e.g., UMPC, 362 N.L.R.B. No. 191 (2015), slip op. at 4–5 (refusing to find special circumstances to justify a business-use e-mail policy, even in a hospital setting).

If there are or will ever be facts to support the "special circumstances" exception, thereby justifying an employer to ban all nonbusiness emails, those facts exist in this case. As set forth, above, allowing NSTs to copy the entire MTSC on nonbusiness emails is inherently distracting to the other NSTs and will impede production. Therefore, a ban is "necessary to maintain production."

The majority also overstated the burdens that neutral e-mail rules place on employees' rights. Focusing on e-mail's centrality to the modern workplace, the majority concluded that employees *need* to use e-mail to effectively communicate with one another. Id. at 4-5. But that conclusion was remarkably anachronistic. Today, American workers have more ways to communicate than ever before. Id. at 23 (Miscimarra, dissenting)(noting the ubiquity of electronic forms of communication, like web-based mail and social media), 40–41 (Johnson, dissenting) (same). They have access to free web-based e-mail accounts, myriad forms of social media, and smart phones. Id. In fact, more than three-fourths of workers now own a smart phone, and nearly as many use social media. See, Aaron Smith, "Record Number of Americans Now Own Smartphones, Have Home Broadband," Pew Research Center (Jan. 12, 2017), http://www.pewresearch.org/fact-tank/2017/01/12/evolution-of-technology/; "Social Media Fact Sheet," Pew Research Center (Jan. 12, 2017), http://www.pewinternet.org/fact-sheet/social-media/ (noting that seven in ten Americans now use social media to "connect with one another, engage with news content, share information[,] and entertain themselves"). In other words, they simply don't need their employers' e-mail systems to communicate.

They can – and already do – communicate through a variety of other tools. Purple Communications, 361 N.L.R.B. No. 126, slip op. at 18 (noting that "employees now have more opportunities to conduct concerted activities relating to their employment than at any other time in human history"). Indeed, in this case, one of the NSTs established a Facebook page in January 2017, which is accessible to all NSTs, but not management, so that they can discuss issues involving the contract and working conditions – the very type of communication the Act seeks to protect.

The majority, however, ignored these tools. It instead set out to solve a problem that did not exist. It assumed that workers in the digital age can only communicate through their employers' e-mail systems, and so adopted a "presumption" that they must have access to those systems. Id. at 1, 6-8 (discussing the centrality of business e-mail in the modern

workplace). But as then-Member Miscimarra wrote in dissent, such presumptions have frequently proven unworkable:

> Nobody will benefit when employees, employers, and unions realize they cannot determine which employer-based electronic communications are protected, which are not, when employer intervention is essential, and when it is prohibited as a matter of law. Not only is such confusion almost certain to result from the majority's decision, it is unnecessary and unwarranted.

Id. at 28.

The Board, however, need not accept such confusion as the status quo. It can and should recognize that Purple Communications is unworkable. It should overrule that decision and return to the rule articulated in Register Guard. There, the Board held that an employer may allow nonbusiness communications through its e-mail system, or it may not. Register Guard, supra, 351 NLRB at 1116. Either way, it must treat communications about protected topics at least as well as it does other non-work-related messages. Id. That rule is simple, administrable, and consistent with the decades of case law preceding the Board's misstep in Purple Communications. Even if the Board will not overrule Purple Communications, it should still apply the rule articulated in Register Guard in this case due to the "special circumstances" within the MTSC.

Finally, applying the rule articulated in Register Guard, there is no evidence that the Postal Service or the MTSC treated communications about protected topics inconsistently from those that are not. Specifically, General Counsel introduced into evidence eight nonbusiness email chains which it may claim did not involve protected communications and management condoned. However, they show just the opposite. One of the emails – i.e., a September 25, 2016, email with a link to an article in The Onion – was sent shortly after the MTSC was restructured in in July 2016, and before Mr. Henegar became the NSTs manager in December 2016. Two of the email chains – i.e., the email chain initiated on January 25, 2017, regarding TMS training and the email chain initiated on March 15, 2017, regarding a reported offer of early

retirement to postal employees – both involved protected communication and yet were not forbidden by MTSC management. Four of the email chains – i.e., one email chain regarding Hurricane Harvey, two email chains regarding Hurricane Irma and one email chain regarding a cookout held by NSTs participating in the recovery effort after Hurricane Irma – were all work-related, at least in part, and did not concern Mr. Watts. That leaves only one email chain – i.e., an August 21-23, email chain regarding the total eclipse of the sun – that is neither protected by the Act nor work-related. This is not sufficient to establish that the MTSC treated non-protected emails better than protected emails, especially given the unique nature of the first total eclipse of the sun to cross the United States in several centuries.[5]

2. Even If Applied, Purple Communications Only Permits Employees To Use An Employer's Email System "On Nonworking Time"

The Board repeatedly states in its majority opinion that employee use of an employer's email system is restricted to nonworking time. "[W]e decide today that employee use of email for statutorily protected communication *on nonworking time* must presumptively be permitted by employers who have chosen to give employees access to their email system." Purple Communications, supra, slip op. 1 (emphasis added). "The presumption that we apply is *expressly limited to nonworking time*." Id. slip op. 15 (emphasis added). "[A]s we have made clear, the presumption we establish is *limited to nonworking time*, for which there is, by definition, no expectation of employee productivity." Id. slip op. 15 fn 72 (emphasis added).

As the Board further states, "contrary to our dissenting colleagues' contentions, we do not do away with the fundamental concept that 'working time is for work.'" Id. This assurance was specifically made in response to then-Member Miscimarra's concern that "this new right will wreak havoc on the enforcement of one of the oldest, clearest, most easily applied of the

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[5] Indeed, even the email chain referenced at paragraph 5(C) of the Complaint, regarding who should pay for passports if required for NSTs to travel, is not evidence that MTSC management treated non-protected communication better than protected communication. While Mr. Fauchier instructed the NSTs to end the discussion after several days of discussion, he did not do so because the communication was protected, but because he had twice provided the NSTs with the Postal Service's position and he felt further discussion was no longer productive.

Board's standards – 'working time is for work,'" Id. slip op. 19. Likewise, Member Johnson explained the same concern as follows:

> The Republic Aviation court, and every subsequent Board and court decision to apply it, recognized that the corollary to the presumptive Section 7 right in physical space was the principle of 'working time is for work.' The Board has long held that employers have a right to ensure that employees are productive during working time. In Republic Aviation, 324 U.S. at 803 fn 10, the Supreme Court affirmed the Board principle from Peyton Packing Co., 49 NLRB 828, 843 (1943), that '[t]he Act, of course, does not prevent an employer from making and enforcing reasonable rules covering conduct of employees on company time. Working time is for work ...' (Emphasis added). The wisdom of that decision is apparent.
>
> Employers exist to produce products and provide services, and no employer would last long in business if its only output was the exercise of Section 7 rights. In other words, no employer could survive if its only endeavor was a never-ending conversation with or among its employees about their terms and conditions of employment. Because the employer's right to exist and produce is the primary right without which Section 7 rights would not long remain in the workplace, the Board and courts have sensibly drawn the bright line rule of 'working time is for work.' Here, the courts and Board have held that the employer's interests in production and discipline required some bright line to show where Section 7 rights to the employer's property normally stopped, and that principle was it. I compliment my colleagues in adhering, at least in the textual body of their opinion, to the long-established rule that working time is for work, and consequently finding that employers have legitimate interests in preventing Section 7 email from spiraling out of control. The majority makes clear at various points in their opinion that the new Section 7 balance only allows employee use of the employer's business email systems on nonworking time, as a technical matter. Yet despite the textual adherence to the 'working time' bright line, the majority still undermines this crucial part of Republic Aviation, by turning it into an exceedingly gray area. As a result, the new standard imposed by the majority will substantially undermine an employer's right to make certain that employees are working during scheduled worktime.
>
> Why? The technology of email does not respect the 'working time'/'break time' boundary. In this respect, email does not care when it is sent, received, reviewed, or composed. The sender of the email may not know whether the recipient is working, and the recipient of an email may not know that the email is not work-related. And, in either case, employees who wish to, can simply send, review, and respond to emails on their working time.

Id. slip op. 49.

Indeed, these are the very concerns that the Postal Service and MTSC management wished to avoid in the instant case. The Postal Service's Management Instruction EL-660-

2009-10, for example, permits employees to make limited personal use of Postal Service equipment, including information technology, "provided such use does not ... [r]educe or otherwise affect the employee's productivity *during work hours*." Similarly, Mr. Henegar's January 25, 2017, instruction states that ...

> Emailing all employees in the network with non-work related items, *during work hours*, is an inefficient use of resources. This platform was created to provide you and your peers the opportunity to share each other's knowledge and skills to better perform your job. Please ensure that, *while you are on working time*, your efforts stay affixed to that goal. This is an expectation, and failure to adhere to this expectation can lead to corrective action.

At hearing, Mr. Henegar explained his rationale for prohibiting employees from sending non-business emails while they are working as follows:

> Well, if they're working, they are to be productively engaged. They're to do the work that they're being assigned, they're being compensated to do a job. They, that job that they were hired that they should be actively engaged in, that work that we assign them is what should be taking up their time.

Within the February 8, 2017, email chain, Mr. Henegar again specifically instructed Mr. Young to "[p]lease refrain from this activity *during your working hours* that is not directly related to supporting a log."

Yet, Mr. Young copied all the NSTs on his February 8, 2017, emails to Mr. Henegar and his February 10, 2017, emails to Mr. Watts. And he did so while he was undisputedly on work time – responding to work-related questions from management about specific work he was performing as part of his job. Moreover, because the NSTs work in 76 to 78 different facilities in six time zones and do not take scheduled lunches or breaks, Mr. Young did not know if some of the other NSTs were working or not working when they received the email. Likewise, the other NSTs did not know if the emails from Mr. Young were or were not work-related when they received and reviewed them.

As such, Mr. Young's use of the Postal Service's email system on February 8 and 10, 2017, copying the other NSTs, was not presumptively permitted under Purple Communication, even if he was engaging in protected activity, and could appropriately be considered for disciplinary action.[6]

3. Mr. Young Was Not Engaged In Concerted Activity When He Copied The Other NSTs On February 8 And 10, 2017

When determining if conduct is "concerted," the Supreme Court has held that although the term "clearly embraces the activities of employees who have joined together in order to achieve common goals," the Act does not clearly articulate "the precise manner in which actions of an individual employee must be linked to the actions of fellow employees in order to permit it to be said that the individual is engaged in concerted activity." NLRB v. City Disposal System, Inc., 465 U.S. 822, 830-31 (1984). The NLRB, in turn, has held that individual conduct is concerted both where "individual employees seek to initiate or induce or to prepare for group action" and where "individual employees bring[] truly group complaints to the attention of management." Meyers Industries, Inc. (Meyers II), 281 NLRB 882, 887 (1986). In addition, the Board has found concerted activity where employees discuss shared concerns among themselves prior to any specific plan to engage in group action. Id. at 886. On the other hand, comments made "solely by and on behalf of the employee himself are not concerted." Id. at 885. For example, the Board held that when an employee who raised a concern about favoritism was speaking "only for himself' and there was no evidence that his coworkers even shared his belief that favoritism existed, his complaint was "a personal gripe," not protected activity. Tampa Tribune, 346 NLRB 369, 371-72 (2006).

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[6] Likewise, the emails which are the subject of paragraph 5(A)(i and ii) of the Complaint (relating to Mr. Young's request for annual leave), paragraph 5(C) of the Complaint (relating to who should pay for passports if needed for postal travel) and/or the amendment to the Complaint at hearing (relating to whether Mr. Young is required to monitor his emails for logs) were not presumptively permitted under Purple Communications. In each case, some of the NSTs to whom those emails were sent were in a work status at the time the emails were sent. Moreover, Mr. Young was necessarily in a work status when he sent the emails about his obligation to check his email for logs, as that is part of his job.

Later, the NLRB held that an employee engaged in concerted activity when he protested a change in the company's dress code in front of other sales representatives, finding that "any doubt about the concerted nature of [the employee's] action is removed by [a second employee] joining that action." Worldmark by Wyndham, 356 NLRB No. 104, slip op. at p. 3 (2011). Finally, the Board has held that "inherently concerted" conversations between coworkers regarding wages, hours or working conditions, involved subjects of such mutual workplace concern that contemplation of group action was not required to find concert. Hoodview Vending Co., 359 NLRB No. 36, slip op. at 3-4 (2012). See also, Automatic Screw Products Co., Inc., 306 NLRB 1072 (1992) (discussing salaries is "an inherently concerted activity clearly protected by Section 7 of the Act"), *enforced,* 977 F.2d 582 (6th Cir. 1992); Aroostook County Regional Ophthalmology Center, 317 NLRB 218 (1995) (discussion of changes in work schedule directly linked to hours and conditions of work and are as likely to spawn collective action as the discussion of wages), enforcement den. in rel. part, 81 F.3d 209 (D.C. Cir. 1996).

Applying this precedent, the NLRB's Office of General Counsel, Division of Advice, has periodically issued advisory opinions addressing whether conduct is or is not concerted. Several of those advisory opinions, in a social media context, are summarized in GC Memorandum OM 12-31. For example:

> Addressing the Charging Party's discharge, we concluded, under the Meyers cases, that the Charging Party's Facebook postings were merely an expression of an individual gripe. The Charging Party's first status update was because she was frustrated about an interaction she had with a supervisor. The Charging Party had no particular audience in mind when she made the post, the post contained no language suggesting that she sought to initiate or induce coworkers to engage in group actions, and the post did not grow out of a prior discussion about terms and conditions of employment with her coworkers. Moreover, there is no evidence that she was seeking to induce or prepare for group action or to solicit group support for her individual complaint. Although one of her coworkers offered her sympathy and indicated some general dissatisfaction with her job, she did not engage in any extended discussion with the Charging Party over working conditions or indicate any interest in taking action with the Charging Party.

Id. (pp. 6-8).

> First, the Charging Party was not engaged in protected concerted conduct under the Meyers cases discussed above. Her Facebook postings expressed her personal anger with coworkers and the Employer, were made solely on her own behalf, and did not involve the sharing of common concerns. The postings also contained no language suggesting that the Charging Party sought to initiate or induce coworkers to engage in group action. Second, the Charging Party did not engage in conduct that, though not concerted, nonetheless implicated common concerns underlying Section 7 of the Act. Rather, the Charging Party's Facebook comments consisted of personal and highly charged rants against coworkers and general profanities about the Employer.

Id. (pp. 11-13).

> To the extent that the Charging Party was also disciplined for her December Facebook posting, that comment could arguably relate to terms and conditions of employment because it pertained to her view that she was not respected on the job. But, even if her comment concerned a protected subject, there was no evidence to establish concert. The Charging Party did not discuss her Facebook post with any of her fellow employees, and none of her coworkers responded. Moreover, the Charging Party was not seeking to induce or prepare for group action, and her activity was not an outgrowth of the employees' collective concerns, but was merely a personal complaint about something that had happened on her shift.

Id. (pp. 30-32).

> We found no evidence of concerted activity under the Meyers cases, discussed above. The Charging Party did not discuss his Facebook posts with any of his fellow employees, and none of his coworkers responded to his complaints about work-related matters. Although he had discussed with other drivers the fact that the on-call dispatcher was not reachable, there is insufficient evidence that his Facebook activity was a continuation of any collective concerns. Moreover, the Charging Party plainly was not seeking to induce or prepare for group action. Instead, he was simply expressing his own frustration and boredom while stranded by the weather, by griping about his inability to reach the on-call dispatcher.

Id. (pp. 32-24).

> We concluded that the Charging Party did not engage in any concerted activity under the Meyers cases discussed above. Although the Charging Party's postings addressed his terms and conditions of employment, he did not seek to initiate or induce coworkers to engage in group action, and none of his coworkers responded to the posting with similar concerns. Nor were his postings an outgrowth of prior employee meetings or attempts to initiate group action with regard to the Employer's sick leave or absenteeism policy. Indeed, the Charging Party himself characterized his conduct as 'just venting.'

Id. (pp. 34-35).

Here, Mr. Young complained he was being harassed when Mr. Henegar and Mr. Watts questioned him about the manner in which he handled two tickets. In one, Mr. Henegar questioned why Mr. Young recommended an NST go on site after only 25 minutes. In the other, Mr. Watts questioned why Mr. Young escalated a ticket to a SME without waiting to see if replacing a cable would solve the problem. Unlike the "inherently concerted" conversations in Hoodview Vending or the dress code in Worldmark by Wyndham, these are specific questions regarding specific work decisions made by Mr. Young – not questions of general applicability or policy that would impact the other NSTs. Moreover, Mr. Young's emails within these chains make it clear he felt that he, and not others, was being harassed.

There is also no evidence that Mr. Young attempted to discuss his concerns with other NSTs before sending the emails. Likewise none of the NSTs copied on the emails responded in any way. Indeed, the only evidence proffered by General Counsel that Mr. Young's emails were anything more than "mere griping" over an individual grievance is a single email purportedly written by NST Joseph Jeske ["Jeske email'] that states "I supported your decision on an APPS ticket that Mr. Henegar was harassing you about." The Jeske email, however, should be disregarded because (1) it constitutes non-admissible hearsay, (2) it cannot be conclusively connected to the issues raised in the February 8 or 10, 2017, email chains and (3) it is contrary to a statement made by Mr. Young, under oath, in his March 28, 2017, NLRB affidavit.

First, hearsay is any statement made out of court and offered in evidence to prove the truth of the matter asserted. F.R.E. 801(c). Hearsay is not admissible except as provided otherwise by

federal statute, the Federal Rules of Evidence, or other rules prescribed by the Supreme Court. F.R.E. 802. Here, General Counsel offers the Jeske email to prove the truth of the matter asserted – i.e., that Mr. Jeske supported Mr. Young's concerns that he was being harassed by Mr. Henegar. General Counsel, however, could have but did not call Mr. Jeske to testify at hearing. Furthermore, General Counsel produced no testimony or evidence to establish that Mr. Jeske's email should be admitted through any of the hearsay exceptions. The Jeske email was likewise not properly authenticated or identified. F.R.E. 901.

General Counsel argued at hearing to admit the Jeske email because "Mr. Young was in that email chain, he's a fellow employee, this all goes to the nature of the concerted activity involved in this case." Tr., p. 61. However, that argument must fail in the same way it is hearsay when a witness testifies that another person, who is not present to testify, verbally told him something. That the statement in question is a written email does not alter the hearsay analysis. Finally, to the extent General Counsel may claim the Jeske email should be admitted because it qualifies as a business record, that argument is not supported by the NLRB or the courts. For example, the Fourth Circuit recently held as follows:

> While properly authenticated e-mails may be admitted into evidence under the business records exception, it would be insufficient to survive a hearsay challenge simply to say that since a business keeps and receives e-mails, then *ergo* all those e-mails are business records falling within the ambit of Rule 803(6)(B). An e-mail created within a business entity does not, for that reason alone, satisfy the business records exception of the hearsay rule. Morisseau v. DLA Piper, 532 F.Supp.2d 595, 621 n. 163 (S.D.N.Y.2008). The district court's observation that the e-mails were kept as a 'regular operation of the business' is simply insufficient on that basis alone to establish a foundation for admission under Rule 803(6)(B).

United States v. Cone, 714 F.3d 197, 219-20 (4th Cir. 2013).

Second, without Mr. Jeske's testimony, one cannot determine solely from the email precisely what he was supporting. While the email states that Mr. Jeske supported Mr. Young's "decision on an APPS ticket that Mr. Henegar was harassing you about," it does not identify what decision or what APPS ticket was at issue. There is no specific reference to the February

8, 2017, ticket or the related email chain between Mr. Henegar and Mr. Young. Moreover, this email is attached to an entirely different email chain relating to training opportunities.

Third, Mr. Young's own statements to the NLRB on March 28, 2017, under oath, contradict any connection of the Jeske email to the February 8 or 10, 2017, email chains. Specifically, Mr. Young stated in his March 28, 2017, NLRB affidavit – provided only 19 days after the Jeske email was allegedly sent – "I did not discuss these issues with any of my fellow employees." If that statement is correct, then the Jeske email cannot relate to the February 8 or 10, 2017, emails as it would constitute a written "discussion" of that matter. In addition, Mr. Young stated in his NLRB affidavit, again under oath, that "none of these employees responded to my emails." Mr. Young incredibly testified at hearing that he meant no one responded to the February 8 or 10, 2017, email chains and, therefore, the Jeske email was not a "response" to those specific email chains. Mr. Young's testimony is not believable and was an after-the-fact attempt to manufacture concerted activity where there was none.

4. Mr. Young's 14-Day Suspension Should Be Deferred To The Parties' Grievance-Arbitration Process

The Board has long recognized arbitration as the preferred means of resolving labor disputes. As early as 1943, for example, the Board expressed its sympathy with the concept of prospective deference to the contractual grievance machinery as follows:

> We are of the opinion ... that it will not effectuate the statutory policy of 'encouraging the practice and procedure of collective bargaining' for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act. On the contrary, we believe that parties to collective contracts would thereby be encouraged to abandon their efforts to dispose of disputes under the contracts through collective bargaining or through the settlement procedures mutually agreed upon by them, and to remit the interpretation and administration of their contracts to the Board. We therefore do not deem it wise to exercise our jurisdiction in such a case, where the parties have not exhausted their rights and remedies under the contract as to which the dispute has arisen.

Consolidated Aircraft Corp., 47 NLRB 694, 706 (1943), enf'd in pertinent part, 141 F.2d 785 (9th Cir. 1944).

Accordingly, the Board has established a policy under which it will defer the further processing of an unfair labor practice case where the matter in dispute has already been submitted to the parties' contractual grievance-arbitration machinery and where there is a "reasonable chance" that such machinery will resolve the dispute. Dubo Manufacturing Corp., 142 NLRB 431, 53 LRRM 1070 (1963). Dubo merely requires that a grievance be pending with the contractual grievance arbitration machinery before deferral may occur. Id. Furthermore, the grievance may be at any stage in the grievance-arbitration process, so long as the procedure contains the final step of binding arbitration. United States Postal Service, 225 NLRB 220, 93 LRRM 1089 (1976).

Similarly, provided certain requirements are met, the Board will also defer to the grievance-arbitration procedures in a Section 8(a)(5) case even though those procedures have not yet begun. Collyer Insulated Wire, 192 NLRB 837, 77 LRRM 1931 (1971). Those requirements are (1) the parties have a long-standing collective bargaining relationship, (2) there is no "enmity" on the part of the employer toward employees' exercise of protected rights, (3) the employer indicates its willingness to arbitrate, (4) the contract's arbitration clause covers the dispute before the Board and (5) the contract and its meaning lie at the center of the dispute. Id. The Board subsequently expanded Collyer to include deferral to the grievance-arbitration process in Section 8(a)(1) and (3) cases. National Radio Co., 198 NLRB 527, 80 LRRM 1718 (1972)(alleging that respondent discharged a union president for his refusal to comply with reporting requirements); United Technologies Corp., 268 NLRB 557, 115 LRRM 1049 (1984)(alleging that respondent threatened an employee with disciplinary action if she persisted in processing a grievance to the second step).[7]

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[7] A request for pre-arbitral deferral, of course, must be raised before or during the unfair labor practice hearing. Duchess Furniture, 220 NLRB 13, 90 LRRM 1160 (1975). Respondent satisfied this requirement by raising

In this case, it is undisputed that Mr. Young's 14-Day Suspension was grieved by the union and has been appealed to arbitration. It is further undisputed that the grievance-arbitration process between the Postal Service and the APWU contains the final step of binding arbitration and broadly covers "[a]ny such discipline or discharge shall be subject to the grievance-arbitration procedure provided for in this Agreement, which could result in reinstatement and restitution, including back pay." Finally, without resolving the grievance, Mr. Watts unilaterally reduced the 14-Day Suspension to a 7-Day Suspension on May 17, 2017.

Accordingly, deferral is appropriate. See also, General Dynamics Corp., 271 NLRB 187, 117 LRRM 1013 (1984)(deferring complaint that the respondent violated Section 8(a)(3) of the Act by suspending the charging party because of his union membership or activity); United Beef Co, Inc., 272 NLRB 66, 117 LRRM 1203 (1984)(deferring complaint that the respondent violated Sections 8(a)(1) and (3) of the Act by harassing the union shop steward, through vulgar language and vilification when processing grievances, and discharging him because of his protected concerted activity).

Finally, General Counsel may try to argue that, if this matter is deferred, the arbitrator may not adequately resolve the disputes and/or may issue an award that is inconsistent with the purposes of the Act. General Counsel, however, need not be concerned about this since the Board, even while deferring the complaint, may retain jurisdiction for the purpose of entertaining a motion for further consideration upon a showing that either (1) the dispute has not been resolved in the grievance procedure or submitted to arbitration, or (2) the grievance or arbitration procedures have not been fair and regular or have reached a result that is repugnant to the Act. United States Postal Service, 270 NLRB 114, 115 (1984).

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deferral both as an affirmative defense in its answer to the complaint and at hearing. GC Exhibit 1(f). Respondent further recognizes that the Board may nevertheless decline to defer cases where use of the grievance-arbitration machinery would be "unpromising or futile" or where the parties will not effectively use their own procedure to resolve those matters. United Aircraft Corp., 204 NLRB 879 (1972). These concerns, however, are not present in the instant case.

III. CONCLUSION

Based on the foregoing, Respondent respectfully submits that the instant complaint be dismissed in its entirety.

Respectfully submitted,

Roderick Eves, Deputy Managing Counsel
Law Department – NLRB
United States Postal Service
1720 Market Street, Room 2400
St. Louis, MO 63155-9948
(314) 345-5864
(314) 345-5893 FAX

CERTIFICATE OF SERVICE

I hereby certify that on this this 31st day of October, I served Respondent's foregoing Post-Hearing Brief as follows:

DIVISION OF JUDGES **(VIA E-FILING)**

Hon. Melissa Olivero
Administrative Law Judge
National Labor Relations Board
Division of Judges

REGION 14 **(VIA EMAIL)**

ROTIMI SOLANKE, Field Attorney
National Labor Relations Board-Region 14
Robert A. Young Federal Building
1222 Spruce Street, Room 8.302
Saint Louis, Missouri 63103-2829
Olurotimi.solanke@nlrb.gov

CHARGING PARTY **(VIA FIRST-CLASS MAIL)**

Roy Young
1007 Mackinac Dr,
Saint Louis, MO 63146-5120

Roderick Eves